1494.

SUPREME COURT OF THE UNITED STATES.

No. 123.

JOHN F. McKENNEY, Plaintiff in Error,

vs.

MANUEL SAVIEGO AND WIFE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF TEXAS.

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IN THE DISTRICT COURT OF THE UNITED STATES,
for the District of Texas:

January Term, 1854.

MANUEL SAVIEGO & WIFE
vs.
JOHN F. McKENNEY.

Be it remembered, that at a Term of the District Court of the United States for the District of Texas, begun and held at the city of Galveston, on the first Monday in January, in the year of our Lord one thousand eight hundred and fifty-four: present, the Honorable John C. Watrous, Judge of said Court, Benjamin McCulloch, Esquire, Marshal, and James Love, Esquire, Clerk, among other were the following proceedings, to wit:—

MANUEL SAVIEGO & WIFE
vs.
JOHN F. McKENNEY.

Be it remembered, that heretofore, to wit: on the twelfth day of October, in the year of our Lord one thousand eight hundred and fifty, the said Manuel Saviego and wife, by Robert Hughes, Esquire, their attorney, filed their petition in the District Court here against the said John F. McKenney, in the words and of the tenor following, to wit:—

Petition.

THE UNITED STATES OF AMERICA,
District of Texas, to wit:

District Court, December Term, 1850.

To the Honorable John C. Watrous, Judge of the District Court of the United States for the District of Texas:

The petition of Manuel Saviego, and Pilar, his wife, aliens, and citizens, and residents of the city of Matamoras, in the State of Tamaulipas, in the Republic of Mexico, plaintiffs, against John F. McKenney, a citizen and resident of the county of Goliad, in the State of Texas, defendant.

And thereupon, your petitioners set forth and complain, that heretofore, to wit: on the 1st day of July, A. D. 1850, at, to wit: in the District aforesaid, your petitioner, Pilar, wife of your petitioner, Manuel Saviego, was seized in her demesne as of fee, by descent from her mother and ancestress, a certain Gertrudis Barrera, deceased, of, in and to a certain tract or parcel of land, situate, lying, and being in the counties of Goliad and Refugio, in the district

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Petition.

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District of Texas, to wit:

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To the Honorable John C. Watrous, Judge of the District Court of the United States for the District of Texas:

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And thereupon, your petitioners set forth and complain, that heretofore, to wit: on the 1st day of July, A. D. 1850, at, to wit: in the District aforesaid, your petitioner, Pilar, wife of your petitioner, Manuel Saviego, was seized in her demesne as of fee, by descent from her mother and ancestress, a certain Gertrudis Barrera, deceased, of, in and to a certain tract or parcel of land, situate, lying, and being in the counties of Goliad and Refugio, in the district

aforesaid, described as follows, to wit: two and one-half leagues, beginning at a stake on the right bank of the San Antonio River, set on the northeast boundary line of a survey for Nicholas Carbajal, bearing N. 71° east, nine varas distant from a hackberry, twenty-four inches in diameter, and south 41° east nine varas, from a live oak twenty inches in diameter; thence south on the boundary line of said Carbajal survey, nine thousand seven hundred varas to a stake for the southwest corner; thence east, three thousand four hundred varas to a stake; thence northeast, four thousand six hundred and seventy varas to the river, a stake south 30° east, eleven varas, from an oak twelve inches in diameter, and north 7° east, nineteen varas distant from an elm twenty inches in diameter; thence with the meanders of said river to the place of beginning, with the hereditaments and appurtenances thereunto belonging; and being so seized, and then and there possessed, the said John F. McKinney, then and there afterwards, to wit: on the day and year aforesaid, at the district aforesaid, with force and arms, entered in and upon, and took possession of the said tract or parcel of land, with the hereditaments and appurtenances thereunto belonging, and then and there ejected, expelled, put out and removed for a long space of time, to wit: from thence hitherto, and other wrongs then and there did, to the great damage of your petitioners: wherefore, they say they are injured and have sustained damage to the value of five thousand dollars; and therefore they bring suit, &c.

The premises considered, your petitioners pray that process may be issued to the Marshal of the District aforesaid, commanding to summon the said McKinney to appear in this Court on the first Monday in the month of December next, then and there to answer this petition: that after trial according to the forms of law, your honor will render judgment in favor of your petitioners for such damages as they have sustained in the premises, and for the recovery of the tract of land, with the hereditaments and appurtenances aforesaid, and for costs about their suit in this behalf expended, and that they have execution of said judgment, or that they have such relief as they may be entitled to; and as in duty bound they will ever pray, &c.

ROB. HUGHES,
for Plaintiffs.

Mem. This action is brought as well to try title as to recover damages for the trespass set forth in the foregoing petition.

ROB. HUGHES,
for Plaintiffs.

Upon which is an acknowledgment of service in the words following, to wit:—

Acknowledgment of Service.

I acknowledge due service on me of process of citation in this case, and agree that this petition be filed in the District Court of the United States for the District of Texas, at Galveston, and proceeded on, and that I will enter my appearance in said Court on the first Monday in December next.

Witness my hand and seal this 25th day of September, A. D. 1850.

JOHN F. McKENNEY, [SEAL.]

PRYOR LEA.

Afterwards, to wit: on the same day and year, the following agreement between Robert Hughes, Esq., the attorney for the plaintiffs, and the defendant, John F. McKenney, was filed, and is in the terms following, to wit:—

Agreement.

UNITED STATES OF AMERICA,
District of Texas, to wit:

District Court, to December Term, 1850.

MANUEL SAVIEGO and WIFE
vs.
JOHN F. McKENNEY.
} Trespass to try title, &c.

It is agreed between Robert Hughes, attorney for the plaintiffs, and the defendant, John F. McKenney, as follows:—

Said defendant may, if he thinks proper, plead not guilty to the action, and under said plea insist upon any special matter as if set forth in a special plea.

The plaintiff Pilar is the wife of the plaintiff Manuel Saviego, and she is the only heir of Gertrudis Barrara, deceased, to whom the land was granted; that said Gertrudis Barrara, in the year 1835, after the commencement of the revolution in Texas, and before the declaration of independence by Texas, removed at the same, with the plaintiff, to Matamoras, in the State of Tamaulipas, where the said Gertrudis departed this life in the year one thousand eight hundred and forty-two.

And it is further agreed that the surveyor of the county of Goliad, Joseph H. Bernard, be, and he is hereby appointed surveyor in this suit; and he is hereby directed to survey the land in contest as either party may direct, having first given reasonable notice to each party, his or their agent or attorney; and, having made said survey, return two fair plats and certificates of the manner of said survey, in which shall be shown the exterior lines of the land in the petition mentioned, and of the interferences, by subsequent locations, by the defendant or those whom he may represent, together with the place

aforesaid, described as follows, to wit: two and one-half leagues, beginning at a stake on the right bank of the San Antonio River, set on the northeast boundary line of a survey for Nicholas Carbajal, bearing N. 71° east, nine varas distant from a hackberry, twenty-four inches in diameter, and south 41° east nine varas, from a live oak twenty inches in diameter; thence south on the boundary line of said Carbajal survey, nine thousand seven hundred varas to a stake for the southwest corner; thence east, three thousand four hundred varas to a stake; thence northeast, four thousand six hundred and seventy varas to the river, a stake south 30° east, eleven varas, from an oak twelve inches in diameter, and north 7° east, nineteen varas distant from an elm twenty inches in diameter; thence with the meanders of said river to the place of beginning, with the hereditaments and appurtenances thereunto belonging; and being so seized, and then and there possessed, the said John F. McKinney, then and there afterwards, to wit: on the day and year aforesaid, at the district aforesaid, with force and arms, entered in and upon, and took possession of the said tract or parcel of land, with the hereditaments and appurtenances thereunto belonging, and then and there ejected, expelled, put out and removed for a long space of time, to wit: from thence hitherto, and other wrongs then and there did, to the great damage of your petitioners: wherefore, they say they are injured and have sustained damage to the value of five thousand dollars; and therefore they bring suit, &c.

The premises considered, your petitioners pray that process may be issued to the Marshal of the District aforesaid, commanding to summon the said McKinney to appear in this Court on the first Monday in the month of December next, then and there to answer this petition: that after trial according to the forms of law, your honor will render judgment in favor of your petitioners for such damages as they have sustained in the premises, and for the recovery of the tract of land, with the hereditaments and appurtenances aforesaid, and for costs about their suit in this behalf expended, and that they have execution of said judgment, or that they have such relief as they may be entitled to; and as in duty bound they will ever pray, &c.

ROB. HUGHES,
for Plaintiffs.

Mem. This action is brought as well to try title as to recover damages for the trespass set forth in the foregoing petition.

ROB. HUGHES,
for Plaintiffs.

Upon which is an acknowledgment of service in the words following, to wit:—

Acknowledgment of Service.

I acknowledge due service on me of process of citation in this case, and agree that this petition be filed in the District Court of the United States for the District of Texas, at Galveston, and proceeded on, and that I will enter my appearance in said Court on the first Monday in December next.

Witness my hand and seal this 25th day of September, A. D. 1850.

JOHN F. McKENNEY, [SEAL.]

PRYOR LEA.

Afterwards, to wit: on the same day and year, the following agreement between Robert Hughes, Esq., the attorney for the plaintiffs, and the defendant, John F. McKenney, was filed, and is in the terms following, to wit:—

Agreement.

UNITED STATES OF AMERICA,
District of Texas, to wit:

District Court, to December Term, 1850.

MANUEL SAVIEGO and WIFE
vs.
JOHN F. McKENNEY.
} Trespass to try title, &c.

It is agreed between Robert Hughes, attorney for the plaintiffs, and the defendant, John F. McKenney, as follows:—

Said defendant may, if he thinks proper, plead not guilty to the action, and under said plea insist upon any special matter as if set forth in a special plea.

The plaintiff Pilar is the wife of the plaintiff Manuel Saviego, and she is the only heir of Gertrudis Barrara, deceased, to whom the land was granted; that said Gertrudis Barrara, in the year 1835, after the commencement of the revolution in Texas, and before the declaration of independence by Texas, removed at the same, with the plaintiff, to Matamoras, in the State of Tamaulipas, where the said Gertrudis departed this life in the year one thousand eight hundred and forty-two.

And it is further agreed that the surveyor of the county of Goliad, Joseph H. Bernard, be, and he is hereby appointed surveyor in this suit; and he is hereby directed to survey the land in contest as either party may direct, having first given reasonable notice to each party, his or their agent or attorney; and, having made said survey, return two fair plats and certificates of the manner of said survey, in which shall be shown the exterior lines of the land in the petition mentioned, and of the interferences, by subsequent locations, by the defendant or those whom he may represent, together with the place

of the improvement or improvements on the said location or locations possessed by said defendant, or those claiming under him; and said report shall be made on or before the first Monday in December next, and James H. Hughes is hereby recognized as the agent of the plaintiffs. It is not intended by this agreement to admit the validity of the grant under which plaintiffs claim.

In testimony whereof the said Hughes and McKenney hereto set their hands and seals this 25th September, A. D. 1850.

ROB. HUGHES, [L. S.]
JOHN F. McKENNEY, [L. S.]

Witness
PRYOR LEA.

Afterwards, to wit: on the twenty-first day of May, in the year of our Lord one thousand eight hundred and fifty-one, the Court here made an order, in the words following to wit:—

Order.

MANUEL SAVIEGO & WIFE
vs.
JOHN F. McKINNEY.

On motion of plaintiffs' attorney, it is ordered that they have leave to amend their petition. It is further ordered that this cause be continued until the next term of this Court.

Afterwards, to wit: on the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and fifty-three, the Court here made the following order, to wit:—

Order.

MANUEL SAVIEGO & WIFE
vs.
JOHN F. McKENNEY.

Upon motion of the defendant, by his attorney, it is ordered that the surveyors of the counties of Refugio and Goliad be, and they are hereby appointed surveyors in this case, and that they, first having given reasonable notice to the parties or their attorneys, do proceed to make such survey as will truly ascertain the true position and the locality of the interior line of the ten coast leagues on the Gulf of Mexico, with reference to the land in controversy, and that he make three fair plats, duly certified, of his proceedings in the premises, and return the same to the term of this Court.

Afterwards, to wit: on the seventeenth day of January, in the year of our Lord one thousand eight hundred and fifty-four, the defendant, by his attorney, Pryor Lea, filed in Court here his plea of not guilty, which is as follows, to wit:—

Plea Not Guilty.

MANUEL SABRIEGO & WIFE
vs.
JOHN F. MCKENNEY.

Comes the defendant, by attorney, and answering, says he is not guilty of the trespass as stated in the petition, and of this puts himself on the country.

PRYOR LEA,
Attorney.

Afterwards, to wit: on the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and fifty-four, the Court made the following order, to wit:—

Order.

MANUEL SAVIEGO and *ux.*
vs.
JOHN F. MCKENNEY.

By agreement of the parties, and assent of the Court, it is ordered that this cause be set down for trial on the 6th day of February.

Afterwards, to wit: on the seventh day of February, in the same year, Robert Hughes, Esquire, attorney for the plaintiff, filed the following admission:—

Admission.

MANUEL SAVIEGO and WIFE
vs.
JOHN F. MCKENNEY.

It is admitted by the plaintiff's counsel, for the purpose of evidence for the defendant, that the original title for the land in controversy has not been deposited in the General Land Office, but only a copy of the testimonio attempted to be authenticated by a Notary in Matamoras.

ROB. HUGHES,
for Pl'tffs.

Afterwards, to wit: on the same day, and in the same year, the following entry was made in the order-book of the Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKINNEY.

On this day came the parties by their attorneys, and thereupon came a jury of good and lawful men, viz: John A. Dupree, James

Robinson, David Bryan, Moses L. Choate, Jacob H. Thackaray, Robert Moffat, Robert D. Johnson, Thomas Pritchard, Horace Eggleston, Isaac D. Hamilton, Thomas M. Jack, and John M. Shepherd, who being elected, tried, and sworn well and truly to try the issue joined, after having made some progress in the trial of the cause, not having time to go through the same, by consent of parties, the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the eighth day of February in the same year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKINNEY.

The consideration of this cause was resumed to-day; after some further progress, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the ninth day of February in the same year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKINNEY.

The consideration of this cause was resumed to-day, and after further progress, not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the tenth day of February of the same year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKINNEY.

The consideration of this cause was resumed to-day, and after some further progress, not having time to go through the same, the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the eleventh day of February of the same year, the following entry was made in the order-book of this Court, to wit:—

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Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKINNEY.

The consideration of this cause was resumed to-day, and after further progress, and not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the thirteenth day of February, of the same year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKENNEY.

The consideration of this cause was resumed to-day, and after further progress, not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the fourteenth day of February, of the same year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKENNEY.

The consideration of this cause was resumed to-day, and after some further progress, not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the fifteenth day of February of the same year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKENNEY.

The consideration of this cause was resumed to-day, and after further progress, not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the sixteenth day of February of the same

year, the following entry was made in the order-book of this Court, to wit:—

Entry.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKENNEY.

The consideration of this cause was resumed to-day, and after further progress, not having time to go through the same, by consent of parties the jury were permitted to disperse until the calling of the cause to-morrow.

Afterwards, to wit: on the seventeenth day of February of the same year, the following verdict and judgment were entered on the order-book of this Court, to wit:—

Verdict and Judgment.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. MCKENNEY.

On this day again came the parties by their attorneys, and after hearing all the evidence, and the charge of the Court, the jury retired to consider of their verdict, and after some time returned and rendered the following verdict:—

"We, the jury, find in favor of plaintiffs, and assess their damages at one cent.

JOHN N. DUPREE,
Foreman."

It is therefore considered by the Court that the plaintiffs recover of defendant, the premises in the petition mentioned, together with the appurtenances thereunto belonging, and one cent in damages, in manner and form by the jurors aforesaid assessed, and thereupon plaintiffs pray that a writ of possession be issued against defendant, to be directed to the Marshal, commanding him to put the plaintiffs in possession of the premises and appurtenances, and to him it is granted. It is also considered by the Court that the plaintiffs recover of defendant their costs about their suit in this behalf expended amounting to sixty-four dollars and eighty-six cents.

Afterwards, to wit, on the eighteenth day of February of the same year, the defendant, by Pryor Lea, Esq., his attorney, filed a motion for a new trial in the words following, to wit:—

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Motion for a New Trial.

DISTRICT COURT OF THE UNITED STATES,
for the District of Texas, at Galveston:

MANUEL SAVIEGO and WIFE
vs.
JOHN F. McKENNEY. } No.

Comes the defendant, by his attorney, and moves the Court to set aside the verdict rendered in this case, and to grant him a new trial for the following reasons, viz:—

First. The Court erred in refusing to give the several instructions requested by the defendant.

Second. The Court erred in the instructions which were given to the jury.

Third. The verdict is against law.

Fourth. The verdict is against evidence.

Fifth. The jurors were not all sworn.

PRYOR LEA, *Atto.*

Afterwards, to wit: on the twenty-third day of March of the same year, the Court here made the following order, overruling defendant's motion for a new trial, to wit:—

Order.

MANUEL SAVIEGO *et ux.*
vs.
JOHN F. McKINNEY.

On this day came the parties by their attorneys, and thereupon came on to be heard the motion of defendant, heretofore filed for a new trial in this cause; and after argument of counsel heard, as well for the plaintiff as for the defendant, it is now here ordered that said motion be overruled.

Afterwards, to wit: on the twenty-fourth day of March of the same year, the Court here made an order in the words following, to wit:—

Order.

MANUEL SAVIEGO and WIFE
vs.
JOHN F. McKINNEY.

On this day came the defendant by his attorney, and presented to the Court his bill of exceptions to the rulings of the Court on the matters of law arising during the progress of the trial of the cause, which were examined, allowed, signed, and sealed, and ordered to be entered of record, as on the days on which they were taken.

Which bill of exceptions, and the papers therein referred to, were on the same day entered of record, and are in the words following, to wit:—

Bill of Exceptions.

MANUEL SAVIEGO and WIFE PILAR
vs.
JOHN F. MCKENNEY.

Be it remembered, that on the trial of this cause proceedings were had as follows, viz:—

The plaintiffs read the deposition of Jose Miguel Aldrete, as follows:—

"That he was Alcalde of the town of Goliad, in the State of Coahuila and Texas, during the year 1833, and that on the ninth day of August in the same year, in the capacity of Alcalde and Commissioner, he gave legal possession of one league of land to Nicholas Carbajal, situated on the San Antonio River, and in the bend formed by said river, and the Pass called the Pass of the Bear, or Oso Pass, and extended to him the corresponding title, a copy of which was made out and signed by him on the 23d of October, 1833, which is marked A, and attached to the deposition of myself in the case of Manuel Saviego and Pilar his wife *vs.* Robert E. Sutton; that Hario de la Garza and Jesus Riojas, were assisting witnesses present, and signed the original title with him; that one of the said witnesses, Hario de la Garza, is now dead, and the other, Jesus Riojas, is now living in the city of Tampico; that he was well acquainted with Gertrudis Barrera; that she was the lawful wife of Francisca Garcia; that she resided in the town of Goliad, in the year 1833; that she is since dead; that she died in Matamoras in 1842; that she had but one child, a daughter named Pilar, who was married to Capt. Manuel Saviego in 1835; that Francisco Garcia died in the year 1834; that Saviego and wife were both citizens of the Republic of Mexico, and believes they are both alive, having never heard of the death of either of them; that he was well acquainted with Nicholas Carbajal, to whom the title was issued; that he had possession of the land since the year 1829; that he put a ranch of stock, horses, &c. on it, and planted fields; that he had possession at the time he extended the title to him, and afterwards to the time of the Revolution; that Nicholas Carbajal had been married, but his wife died; does not know in what year; that he had three children, José, Maria, Tomas, and Refugia, by his first wife; that he thinks Refugia is dead, but is not positive; that about the year 1825, or 1826, he is not certain about the time, Nicholas Carbajal married a widow, named Maria Dolores Saeuz, who had no family by her first husband, and none by him; that Carbajal died he thinks about the year 1835, in the first part of the year; that he knows the title to be perfect and legal according to the laws of Mexico; that he gave the possession and extended

the title, and the order of the Supreme Government of the State of Coahuila and Texas, dated the 23d of May, 1830; that he never received any order from the Executive Government of the State of Coahuila and Texas, prohibiting him to give possession and extend titles to any one; that his authority to do so never ceased, but was stopped by the Revolution; that the family of Saviego left the country about the 5th or 6th of October, 1835, but that Saviego was taken prisoner in the night of the 9th of October; that in 1836 Saviego came into the country with Filisola, but had no command; that after Filisola returned to Matamoras, he reinstated Saviego in his command as captain in the Mexican army, and that afterwards he rose to the rank of colonel in the years from 37 to 40; is not positive about the time. The children of Carabajal lived in Matamoras after they left the country; and further this deponent saith not."

Bill of Exceptions Continued.

On the deposition of José Miguel Aldrete as aforesaid, the plaintiffs offered to read in evidence the grant to Gertrudis Barrera, with accompanying documents, when defendant objected for want of proof of authentication; but the objection was overruled by the Court, and the defendant excepted to the opinion of the Court in admitting said papers as evidence; they were then read by a translation as follows, viz:—

Translation.

[L. S.]

Second seal, twelve bits, for the year eighteen hundred and twenty-six, and eighteen hundred and twenty-seven, 28, 29, 30, 31, 32 and 33.

Mr. Alcalde of this town: Mrs. Gertrudis Barrera, a resident here, before you presents herself, and says: that the Supreme Government of the State, by decree of the 2d day of May, 1833, conceded by way of sale, and according to the rule of the colonization law, four leagues of land, including one in gift, in the bend called San José, where her ranch is situated, on the right bank of this river San Antonio, and for the same I come to you as commissioner for the distribution of lands within the limits comprehended in this jurisdiction, to the end that, conformably to the disposition of the Supreme Government, you may please to command the survey of said land, which she designated in the following terms: The survey of the league in gift shall commence at the point of the hill of the *rineon* of San José, with the point of the compass east to the place of the *canoes* (canoitas), and the other three leagues at the termination of the measurement of the other, and in the same direction; hoping you will please to extend the corresponding title of possession under the belief that I will conform myself to the figure

Which bill of exceptions, and the papers therein referred to, were on the same day entered of record, and are in the words following, to wit:—

Bill of Exceptions.

MANUEL SAVIEGO and WIFE PILAR
vs.
JOHN F. MCKENNEY.

Be it remembered, that on the trial of this cause proceedings were had as follows, viz:—

The plaintiffs read the deposition of Jose Miguel Aldrete, as follows:—

"That he was Alcalde of the town of Goliad, in the State of Coahuila and Texas, during the year 1833, and that on the ninth day of August in the same year, in the capacity of Alcalde and Commissioner, he gave legal possession of one league of land to Nicholas Carbajal, situated on the San Antonio River, and in the bend formed by said river, and the Pass called the Pass of the Bear, or Oso Pass, and extended to him the corresponding title, a copy of which was made out and signed by him on the 23d of October, 1833, which is marked A, and attached to the deposition of myself in the case of Manuel Saviego and Pilar his wife *vs.* Robert E. Sutton; that Hario de la Garza and Jesus Riojas, were assisting witnesses present, and signed the original title with him; that one of the said witnesses, Hario de la Garza, is now dead, and the other, Jesus Riojas, is now living in the city of Tampico; that he was well acquainted with Gertrudis Barrera; that she was the lawful wife of Francisca Garcia; that she resided in the town of Goliad, in the year 1833; that she is since dead; that she died in Matamoras in 1842; that she had but one child, a daughter named Pilar, who was married to Capt. Manuel Saviego in 1835; that Francisco Garcia died in the year 1834; that Saviego and wife were both citizens of the Republic of Mexico, and believes they are both alive, having never heard of the death of either of them; that he was well acquainted with Nicholas Carbajal, to whom the title was issued; that he had possession of the land since the year 1829; that he put a ranch of stock, horses, &c. on it, and planted fields; that he had possession at the time he extended the title to him, and afterwards to the time of the Revolution; that Nicholas Carbajal had been married, but his wife died; does not know in what year; that he had three children, José, Maria, Tomas, and Refugia, by his first wife; that he thinks Refugia is dead, but is not positive; that about the year 1825, or 1826, he is not certain about the time, Nicholas Carbajal married a widow, named Maria Dolores Saeuz, who had no family by her first husband, and none by him; that Carbajal died he thinks about the year 1835, in the first part of the year; that he knows the title to be perfect and legal according to the laws of Mexico; that he gave the possession and extended

the title, and the order of the Supreme Government of the State of Coahuila and Texas, dated the 23d of May, 1830; that he never received any order from the Executive Government of the State of Coahuila and Texas, prohibiting him to give possession and extend titles to any one; that his authority to do so never ceased, but was stopped by the Revolution; that the family of Saviego left the country about the 5th or 6th of October, 1835, but that Saviego was taken prisoner in the night of the 9th of October; that in 1836 Saviego came into the country with Filisola, but had no command; that after Filisola returned to Matamoras, he reinstated Saviego in his command as captain in the Mexican army, and that afterwards he rose to the rank of colonel in the years from 37 to 40; is not positive about the time. The children of Carabajal lived in Matamoras after they left the country; and further this deponent saith not."

Bill of Exceptions Continued.

On the deposition of José Miguel Aldrete as aforesaid, the plaintiffs offered to read in evidence the grant to Gertrudis Barrera, with accompanying documents, when defendant objected for want of proof of authentication; but the objection was overruled by the Court, and the defendant excepted to the opinion of the Court in admitting said papers as evidence; they were then read by a translation as follows, viz:—

Translation.

[L. S.]

Second seal, twelve bits, for the year eighteen hundred and twenty-six, and eighteen hundred and twenty-seven, 28, 29, 30, 31, 32 and 33.

Mr. Alcalde of this town: Mrs. Gertrudis Barrera, a resident here, before you presents herself, and says: that the Supreme Government of the State, by decree of the 2d day of May, 1833, conceded by way of sale, and according to the rule of the colonization law, four leagues of land, including one in gift, in the bend called San José, where her ranch is situated, on the right bank of this river San Antonio, and for the same I come to you as commissioner for the distribution of lands within the limits comprehended in this jurisdiction, to the end that, conformably to the disposition of the Supreme Government, you may please to command the survey of said land, which she designated in the following terms: The survey of the league in gift shall commence at the point of the hill of the *rineon* of San José, with the point of the compass east to the place of the *canoes* (canoitas), and the other three leagues at the termination of the measurement of the other, and in the same direction; hoping you will please to extend the corresponding title of possession under the belief that I will conform myself to the figure

which results from what the locality of the ground permits, and for the despatch of the title of possession, which corresponds, she annexes a legalized copy of the despatch begun by the Supreme Government.

GERTRUDIS BARRARA.

TOWN OF GOLIAD, *July* 13*th*, 1833.

MOST EXCELLENT SIR: The citizen Francisco Garcia, a retired captain and resident in the garrison of the Bay of the Sanctified Spirit, before your highness, in the form which has place in right, says: that in the past year 1825, he asked from the Supreme Government of the State two leagues of land in the lands of the ancient mission of the Sanctified Spirit (Espiritu Santo), in accordance with the law of colonization of the Honorable Congress, and not having been advised at the time he made his request, whether in fact the said mission was secularized, he proposes to withdraw his request, in order to repeat it in other lands entirely vacant, as that in which with the permission of the Alcalde of this point, he proposes in good faith, and where he has formed an establishment for labor and the raising of stock, the pecuniary expenses of the former, which he has encountered, being heavy, and the collection of the latter obliges him to ask that in conformity to that to which he refers as a settler, you will give him possession of two leagues of land, in the place called the bend of San José, on the west margin of the river San Antonio, the measurement of which shall commence at the pass of the same name a right line east, and from this point downwards in the direction south, to form a square or the figure which the locality of the land permits, and containing the said two leagues. To you he repeats his petition, that you concede, in which he will receive favor, and swears this not to be of malice, &c.

FRANCISCO GARCIA.

GARRISON OF THE BAY OF THE SANCTIFIED SPIRIT, 10*th October*, 1827.

MOST EXCELLENT SIR: That which the party represents being in effect only a repetition, this Ayuntamiento encounters no obstacle, so that you may concede the two leagues solicited, by reason of his having the necessary qualifications in proper proportions, to have power to make his establishment which he offers, and which are required by the law of colonization; on account of which hopes the resolution made upon attentive examination may be promptly despatched.

THOMAS BUENTELLA.

JOSE ANTONIO VASQUEZ,
Secretary.

BAY, *October* 11*th*, 1827.

MOST EXCELLENT SENIOR GOVERNOR: Maria Gertrudis Barrara, a native of this town, before your excellency, with proper respect, has presented, that, from the end of the year 1826, she has established a ranche on the bank of the river San Antonio, with the previous consent of the Alcalde in that year, and which in the year 1827, her husband, the citizen Francisco Garcia, denounced in form the lands in which he found himself, by means of a petition which he presented to this Ayuntamiento, so that with its information, which was favorable, he might direct it to the Supreme Government of your excellency, to the end to obtain the favor and concession of the two leagues which he solicited, in the class of settler, as he desired, from thence to the present time he has not known the result, from which time each day, the legal adjudication of said land is more interesting, by reason of the expenses incurred in the boundary of a habitation, in the inclosures made, in the clearing of the labors which he has cultivated, and in fine, by the collection of his stock in the length of time of five years, in which he has augmented the raising. I come to your excellency asking that you will ratify the permission we have for the establishment of a ranch, and concede to me four leagues of pasture land, which I need by reason of having augmented my stock to two hundred and forty-seven head; the lines and cardinal points of which, ascertained by a calculation approaching the four leagues solicited, are, first, the pass of San José in a direction east; second, the point called the canoes, south; third, the live-oak woods of the ponds, west; north, running the survey with the river San Antonio, offering besides to hold them as settler, and to cultivate according to the quality, and pay for them, giving for the completion of the first payment, the time of four years, from the time of possession. For so much, to your excellency I repeat my request, in the confidence that you will please to accede, on the supposition that the land is vacant, and corresponds to no other person, corporation, or community.

Most Excellent Sir,

GERTRUDIS BARRARA DE GARCIA.

TOWN OF GOLIAD, 23*d August*, 1831.

PRINCIPAL HALL OF GOLIAD, *September* 1*st*, 1831.

It is certain, as the party asking exposes, that she is entitled to the favor she seeks, because besides having settled the land to which she refers, since the time mentioned, she asks for it opportunely, approved by *by* this corporation, and the despatch which she commenced was directed to the Supreme Government of the State, not having been forwarded for reasons of which we are ignorant. The land is absolutely vacant, and pertinent to this municipality, for which this corporation encounters no obstacle to the concession to

the party interested, but nevertheless it belongs to the most Excellent Governor to do that which shall be right.

RAFAEL MANCHOLA,
President.

JOSÉ ENCARNACION VASQUEZ,
Secretary.

LEONA VICARIO, 29*th of September*, 1832.

The new colonization law, or decree No. 190, despatched by the Honorable Congress on the 28th day of April of the present year, not permitting the concession of more than one league to persons who ask land as settlers, I cannot accede to the petition of the seinora in that which she asks, and, in consequence, I return this despatch, in order that she may, whether she desires, in sale the four leagues she asks for, and in that case the Ayuntamiento of the town of Goliad shall declare in view of that provided in the 14th article of said law, what is the situation of said land, for the ascertainment of that which she ought to pay to the State, in conformity to the provision of the last part of the 13th article.

ECA & MUSQUEZ.

SANTIAGO DEL VALLE,
Secretary.

MOST EXCELLENT SIR: In attention to that which is stated by your Excellency, in the superior decree which precedes, I ought to propose, that supposing that you cannot concede to me the four leagues which I ask as a settler, by virtue of the law of the 24th of March, 1825, which is repealed, I claim the favor conceded by the 8th article of the new law of colonization, No. 190, by reason of the merit of possessing double the number of head of larger stock, which by that is necessary to be entitled to one league of by way of gift; and as regards the other land which I need to pasture my stock, within the limits indicated by my representation of the 23d of August of the past year of 1831, I am disposed to receive them by way of purchase, subjecting myself to the provisions contained in article 14, of said law, binding myself to pay into the office of the Treasurer of the State, in this department, what your Excellency may please to direct, as to the fourth part of the value which may arise from said three leagues according to their quality.

Most Excellent Sir,

GERTRUDIS BARRARA DE GARCIA.

TOWN OF GOLIAD, *December* 10*th*, 1832.

PRINCIPAL HALL OF GOLIAD, *December* 22*d*, 1832.

This Ayuntamiento, by virtue of the superior decree which appears from the Governor of the State, dated 29th September of the cur-

rent year, in the act of the date of the 23d of August of the last year of 1831, where the Senora declares that which she represents; and in consequence of article fourteen of the law of colonization, No. 190, of the 28th day of April of the present year, declare that the land which she denounces is absolutely vacant, not enclosed in the litoral leagues, nor appertaining to any *empresa;* and as to that which relates to the classification, this only can be made by the commissioner or surveyor, at the time of giving possession to the interested seniora, and who, at this time, maintains somewhat more than two hundred head of domestic animals, and other goods of the field, on account of which this corporation encounters no obstacle to the concession of the four leagues, in the manner solicited in the preceding exposition: return the preceding despatch to the party, so that she may have of it the uses which may be convenient.

JUAN JOSÉ HERNANDEZ.

JOSÉ ANTONIO VASQUEZ,
Secretary.

MONTCLOVA, 2*d day of May*, 1833.

In conformity to the provisions of articles thirteen and eighteen of the new law of colonization despatched by the Honorable Congress of the State, on the 28th day of April, 1832, I concede to the person who petitions, one league of land as a settler, and the three which she asks in sale in the place she specifies, or in that which may be more convenient, without the littoral leagues, provided by no title it belongs to any corporation or persons. The Commissioner for the distribution of lands, if that asked for belongs to an *empresa*, or, in his absence, or not being within any point contracted for, the Alcalde of the respective municipality, or that more immediate, complying with the dispositions and laws given concerning the matter, will give the possession of said leagues and despatch the corresponding title, with the understanding that payment ought to be made by the interested party, in the mode and upon the terms prescribed by the last part of said thirteenth article, making it, in the whole, with the promptitude required by this article, in the treasury of the State, placing in it seventy-five dollars, which is the fourth part of the value of the three leagues conceded in sale amounts to; of which act the purchasers shall present one evidence, to the end that in its view the Secretary of this government proceed to give her a copy of her petition and the present decree, that, going with it to the Commissioner, the effects may be had which are consequent.

VERAMENDÉ.

SANTIAGO DEL VALLE, *Secretary.*

This is a copy of the original which exists in the archives of the office of my charge, from which I command it to be taken by the

direction of the most excellent Governor, Montclova, 3d of May, 1833.

SANTIAGO DEL VALLE,
Secretary.

GOLIAD, 14*th of July*, 1833.

Presented and allowed with the annexed documents, in attention to which, and the land denounced having been declared vacant by the laws of the State, No. 177, of the 29th of April, 1831, not belonging to a corporation or to any person, as well as to no contract of colonization, and formed without the littoral leagues and within the limits which include the jurisdiction of this municipality; in consequence, besides, of the commission of distribution of lands given by the supreme government of the State to the Alcalde of this town, in the superior order of the 25th of June of said year 1831, I ought to command, and by these presents do command that the scientific surveyor, George W. Cash, appointed under the previous corresponding security, proceed to the survey of the land which the interested party solicits, to which effect I will give by myself the necessary notice, before those of my assistance, in conformity to the law.

JOSÉ MIGUEL ALDRETE.

As. As.
MARIANO CASIO. RAFAEL CHOWELL.

I continue, he adds; I present and notify to you, the surveyor, George W. Cash, the preceding decree; for the giving it, I say, hear ye; and, in obedience thereto, you shall proceed to the survey of the land denounced by the interested party according to your best knowledge and intention, remaining advised that, in continuation of this despatch, you must set down the notes of the corresponding survey, and sign this with me and those of my assistance.

GEORGE W. CASH. JOSÉ MIGUEL ALDRETE.

As. As.
MARIANO CASIO. RAFAEL CHOWELL.

MR. ALCALDE COMMISSIONER:

Having proceeded, according to your order, to the survey of four leagues of land for Mrs. Gertrudis Barrara, at the pass of San José and below, I only found vacant land between the lines of Mr. Nicholas Carbajal and Antonio Sydeek, for two and one-half leagues, which are those which I surveyed, whose form the plan represents, which in duplicate accompanies to you, having the notes which follow:—Commencing the survey on the right bank of the river San Antonio, on the southeast boundary of Nicholas Carbajal's old stake, north, seventy-one degrees east, nine varas distant from a hackberry twenty-four inches in diameter, and south, forty-one degrees east, nine varas distant from an overcup oak twenty inches in diameter; from this

stake I continued in the direction south and to the length of the line of said Carbajal to the distance of nine thousand seven hundred varas, where I placed a second stake, which represents the boundary of the southwest; from thence I run directly east to the distance of three thousand four hundred varas, where I placed the third stake for the boundary of the southeast, from which I ran in the direction northeast to the distance of four thousand six hundred and seventy varas, encountering the river, on the bank of which I placed the fourth stake, which I found south, thirty degrees east, eleven varas from an overcup oak twelve inches in diameter, and north, seven degrees east, nineteen varas distant from an elm twenty inches in diameter; from the fourth stake pursuing the survey with the meanders of the river until arriving at the place of leaving it. The quality of said land consists principally, in two classes, which are of black and white sand, and in the time of rain it is impossible to use them with cattle and beasts; and the upland consists, in the general, of white oak.

Town of GOLIAD, 20*th of July*, 1833.

GEORGE W. CASH.

[For map, see original, p. 34.]

The land asked for by Mrs. Gertrudis Barrara having been surveyed, in consequence of the concession which she obtained from the Supreme Government of the State, as appears by the documents which remain annexed to this despatch, I adjudicate to her the title of property, in order that by means thereof she may possess, according to the provisions of the laws. By this act thus I decree, command, and sign, with two witnesses of assistance, in this town of Goliad, on the 21st day of the month of July, 1833, which I certify.

JOSÉ MIGUEL ALDRETE.

As. MARIANO CASIO.

As. RAFAEL CHOWELL.

Miguel Aldrete, only constitutional Alcalde of this town, and commissioned by the Supreme Government of the State of Coahuila and Texas, in the superior order of the 25th of June, 1831, for the distribution and possession of vacant lands, within the limits which include this jurisdiction, and not belonging to contracts made with contractors for colonization, for as much Mrs. Gertrudis Barrara, in conformity to the authority she has, according to the concession of four leagues of land, united or separated, by decree of the second day of May, 1833, has designated two and one-half leagues of the four conceded in the lands declared vacant within the jurisdiction of my charge, and in conformity to the preceding notes. In the name of the State, I confer, authorize, and place her in possession, effective and personal, of sixty-two million, five hundred thousand square

varas, or which is the same, of two and one-half leagues of land, the boundaries of which are designated in the map, and notes of survey made by the surveyor, George W. Cash, as may be seen in this despatch, declaring moreover that said land contains four labors of temporal and the rest of pasture land, which is intended for the making by the party interested, the respective payment, in conformity to the law of colonization of the 28th day of April, 1832, it remaining understood that within one year she has to construct corners of stone on each angle of the land, that she has to settle and cultivate, in conformity to that commanded in said law, and to comply scrupulously with everything else ordained in it, and provided that it never can pass in mortmain.

For so much using the faculties which are given me by the law, and the consequent instructions of the 4th day of September, 1827, I despatch the present title, and command that she have a testimonio of it, and that the interested party enter, so that she may possess and take the fruits of the land, of which I have given her the possession, to her, her children, heirs, and successors, or whoever of him, her, or them, shall have right or action in representation. This given in the town of Goliad, the 21st day of the month of July, 1833.

JOSÉ MIGUEL ALDRETE.

This is a copy of the original, which exists in the archives of this jurisdiction. Goliad, 22d of July, 1833.

JOSÉ MIGUEL ALDRETE.

REFUGIO, *October 22d*, 1834.

The preceding title of property to two and one-half leagues of land, adjudicated by the Judge of Goliad, having been presented to me by an agent of Mrs. Gertrudis Barrara, with the object that by me it might be respected in right, and as a consequence remove the notorious defect of not being a title despatched by the proper commissioner, supposing that this land is in the littoral leagues, and by a mistake it was supposed not to be included: I have come, in the use of my faculties, to examine all the documents with which the party has to support said acquisition, and finding them just and legal, by reason of the respect which I have for the Supreme Government issuing them, I give it anew and legalize it in form, in conformity to the superior decree of the 2d day of May, 1833, so that remaining firm and subsisting in all its parts, it may serve to the interested party for a guard and security of her right. I, the citizen José Jesus de Vidaurri, special commissioner of the Supreme Government of the State for the establishment of this colony, thus decree command, and sign, with those of my assistants. I certify.

JOSÉ JESUS VEDAURRI.

As. EUGENIO MARANO.

As. SANTIAGO SUND.

Bill of Exceptions continued.

The plaintiff then proved the boundaries of the grant to Gertrudis Barrera, and that defendant was in possession of several parts, some of them in Goliad, and some in Refugio County, at the institution of the suit.

On the part of the defendant, the evidence was as follows:—

It was admitted and agreed between the parties by their attorneys, to the effect that the possessions of defendant were covered by locations and surveys of valid land certificates held by defendant, which certificates and surveys were regularly returned to the General Land Office, before the 31st of August, 1853; and further, that Gertrudis Barrera was the mother of plaintiff Pilar, and the latter the only child of the former. The plaintiffs were married in the year 1834, at Goliad, on the San Antonio River, in that part called Texas, of the State of Coahuila and Texas, where they and said Gertrudis continued to live until the autumn of 1835 (after the commencement of the revolution in Texas, but before her declaration of independence), when all of them together removed to Matamoras, west of the Rio Grande River, and said Gertrudis continued to reside there as a Mexican citizen until her death, which occurred in the year 1842. And the plaintiffs, since their removal to Matamoras as aforesaid, have continued to reside there, and in other parts of Mexico, west of the Rio Grande River, as Mexican citizens, to the present time.

The defendant then read the deposition of Joseph H. Barnard, and exhibited the map therewith, as follows, viz:—

Joseph H. Barnard, a witness for defendant, stated that he was the Surveyor of Goliad County, in which lie the land in controversy and those adjacent, and that he has at different times surveyed all the tracts of land along the southwest bank of the San Antonio River, from the upper part of the Buentello tract down to the lower stone pillar of what is called the Garcia tract, from which stone pillar, in conjunction with A. H. Lea, Surveyor of Refugio District, under an order of the United States District Court at Galveston, and under instructions of counsel,) he made a random line to the head of Hind's Bay, and connected that point with the head of Mission Bay, and the two mouths of the Guadaloupe River, as shown in a map as exhibited by witness, a copy of which map is part of this statement as attached.

Witness said that much care was taken to be accurate in making the surveys and angular observations, necessary for the connections aforesaid, the principal object being to show the extension of ten Spanish or Mexican leagues from the coast at each of the said points, in connection with the tracts of land above said stone pillar, which tracts had been previously surveyed by witness as aforesaid. Accordingly witness (from field notes) made the connections as exhibited in the map.

varas, or which is the same, of two and one-half leagues of land, the boundaries of which are designated in the map, and notes of survey made by the surveyor, George W. Cash, as may be seen in this despatch, declaring moreover that said land contains four labors of temporal and the rest of pasture land, which is intended for the making by the party interested, the respective payment, in conformity to the law of colonization of the 28th day of April, 1832, it remaining understood that within one year she has to construct corners of stone on each angle of the land, that she has to settle and cultivate, in conformity to that commanded in said law, and to comply scrupulously with everything else ordained in it, and provided that it never can pass in mortmain.

For so much using the faculties which are given me by the law, and the consequent instructions of the 4th day of September, 1827, I despatch the present title, and command that she have a testimonio of it, and that the interested party enter, so that she may possess and take the fruits of the land, of which I have given her the possession, to her, her children, heirs, and successors, or whoever of him, her, or them, shall have right or action in representation. This given in the town of Goliad, the 21st day of the month of July, 1833.

JOSÉ MIGUEL ALDRETE.

This is a copy of the original, which exists in the archives of this jurisdiction. Goliad, 22d of July, 1833.

JOSÉ MIGUEL ALDRETE.

REFUGIO, *October 22d*, 1834.

The preceding title of property to two and one-half leagues of land, adjudicated by the Judge of Goliad, having been presented to me by an agent of Mrs. Gertrudis Barrara, with the object that by me it might be respected in right, and as a consequence remove the notorious defect of not being a title despatched by the proper commissioner, supposing that this land is in the littoral leagues, and by a mistake it was supposed not to be included: I have come, in the use of my faculties, to examine all the documents with which the party has to support said acquisition, and finding them just and legal, by reason of the respect which I have for the Supreme Government issuing them, I give it anew and legalize it in form, in conformity to the superior decree of the 2d day of May, 1833, so that remaining firm and subsisting in all its parts, it may serve to the interested party for a guard and security of her right. I, the citizen José Jesus de Vidaurri, special commissioner of the Supreme Government of the State for the establishment of this colony, thus decree command, and sign, with those of my assistants. I certify.

JOSÉ JESUS VEDAURRI.

As. EUGENIO MARANO.

As. SANTIAGO SUND.

Bill of Exceptions continued.

The plaintiff then proved the boundaries of the grant to Gertrudis Barrera, and that defendant was in possession of several parts, some of them in Goliad, and some in Refugio County, at the institution of the suit.

On the part of the defendant, the evidence was as follows:—

It was admitted and agreed between the parties by their attorneys, to the effect that the possessions of defendant were covered by locations and surveys of valid land certificates held by defendant, which certificates and surveys were regularly returned to the General Land Office, before the 31st of August, 1853; and further, that Gertrudis Barrera was the mother of plaintiff Pilar, and the latter the only child of the former. The plaintiffs were married in the year 1834, at Goliad, on the San Antonio River, in that part called Texas, of the State of Coahuila and Texas, where they and said Gertrudis continued to live until the autumn of 1835 (after the commencement of the revolution in Texas, but before her declaration of independence), when all of them together removed to Matamoras, west of the Rio Grande River, and said Gertrudis continued to reside there as a Mexican citizen until her death, which occurred in the year 1842. And the plaintiffs, since their removal to Matamoras as aforesaid, have continued to reside there, and in other parts of Mexico, west of the Rio Grande River, as Mexican citizens, to the present time.

The defendant then read the deposition of Joseph H. Barnard, and exhibited the map therewith, as follows, viz:—

Joseph H. Barnard, a witness for defendant, stated that he was the Surveyor of Goliad County, in which lie the land in controversy and those adjacent, and that he has at different times surveyed all the tracts of land along the southwest bank of the San Antonio River, from the upper part of the Buentello tract down to the lower stone pillar of what is called the Garcia tract, from which stone pillar, in conjunction with A. H. Lea, Surveyor of Refugio District, under an order of the United States District Court at Galveston, and under instructions of counsel,) he made a random line to the head of Hind's Bay, and connected that point with the head of Mission Bay, and the two mouths of the Guadaloupe River, as shown in a map as exhibited by witness, a copy of which map is part of this statement as attached.

Witness said that much care was taken to be accurate in making the surveys and angular observations, necessary for the connections aforesaid, the principal object being to show the extension of ten Spanish or Mexican leagues from the coast at each of the said points, in connection with the tracts of land above said stone pillar, which tracts had been previously surveyed by witness as aforesaid. Accordingly witness (from field notes) made the connections as exhibited in the map.

From these surveys, it appears that a radius of ten leagues from the upper or northern mouth of the Guadalupe, would not reach any part of the Buentello tract; but a radius of ten leagues from the head of Mission Bay would extend within said tract, as at the star on the map, and an arc therefrom would include about two-thirds of the Buentello league, and a line from the star S. 48° or 49° W. would include about three-fourths of that league within ten coast leagues, if thus surveyed.

Witness said he had by request extended a line of ten leagues from the mouth of the Guadalupe N. 45° W. as accurately as may be by such mapping, which can only be an approximation.

From the outer terminus of this line, a course S. 48° or 49° W. would leave nearly or quite the whole of the Buentello league within the coast leagues, if thus surveyed.

[For map see original, p. 42.]

It is agreed that the foregoing statement (with the map attached) is evidence in the case, in the District Court of the United States, at Galveston, wherein Manual Saviego and wife are plaintiffs, and John F. McKenney is defendant, to be used by the defendant.

ROB. HUGHES,
for Pl'ffs.

PRYOR LEA,
Attorney for Defendant.

Bill of Exceptions continued.

The defendant then proved, by S. A. White, as follows, viz: In the year 1834, during the last half of it, witness was appointed one of the surveyors for the colony of Power and Hewetson. He was so appointed by José Jesus de Vidaurri, the Commissioner of that colony. As such surveyor, witness was instructed by said Commissioner to run or survey as follows: Beginning at the mouth of each of the rivers Guadalupe and Nueces, and running ten leagues up each river on a straight line, then connecting by a straight line the points on the rivers so ascertained. The instructions were oral. The object was to define the boundaries of the colony. Witness executed the instructions by careful and actual surveys, as follows: He was not at that time well informed as to the existence of what is now known as the upper or northeastern mouth of the Guadalupe River, and his survey was commenced at the lower mouth, from which he extended a line of ten leagues up the Guadalupe River, the course being about N. 45° W., but cannot give the course precisely, in the absence of field notes. He then extended a similar line from the mouth of the river Nueces, up it ten leagues. He then connected those upper points on

the river, by first running a random line, and then a rectified right line between them. The course of that line was about S. 48½ W.; but the precise course cannot be stated, in the absence of field notes. That line included within the colony all the Buentello tract, except a small triangular piece at the N. W. corner. The line and tracts appear to be accurately represented on the map exhibited by witness Barnard.

This witness has recently seen the marks he made on the colonial line, when surveying it near to that of Buentello; and also marks he made in surveys of leagues in that vicinity for colonists. He knows the localities well, and recollects certain improvements which were occupied by some Mexicans on the Buentello tract when he surveyed the colonial boundary, and they were within the colony. The whole of the Nicholas Carbajal tract, and that granted by Gertrudis Barrera, are within the colony, if thus surveyed.

As appears by the map, with the connections of the line ten leagues up the Guadalupe, and of a line about S. 48½ W., the surveys and platting of the witness Barnard will give a line very nearly corresponding with the old colonial line run by witness.

This witness was also the colonial surveyor for the colonial leagues on the San Antonio and Guadalupe Rivers, from their mouths to the upper part of the colony; and such surveys extended to the colonial line on the San Antonio River, and cornering a short distance above. These surveys were made in a regular series from the bay shore upward. The county line and that run by Richardson is the same, as appears on the map.

The defendants then read parts of the documents connected with the colonial contract of Power & Hewetson, as certified from the General Land Office of Texas, according to law, viz:—

"(*Resolution of the Supreme Government.*)

"MOST EXCELLENT SIR: His Excellency, the President, has had "before him the document of the citizen Santiago Hewetson and his "partner, Power, which accompanies your Excellency's note, No. "102, dated 2d October, 1826, relative to permitting him to colonize "with four hundred families, Mexicans and foreigners from Ireland, "the littoral lands which comprehend the Gulf of Mexico, from the "mouth of the river Nueces as far as that of the 'Labaca' Creek. He "has been pleased, in conformity with the exposition of your Excel- "lency, to approve the concession of the vacant lands (which have "been petitioned for); that they are not comprehended in those con- "ceded to Col. Pedro Elias Bean, nor in the extension enjoyed by "the State of Tamaulipas; and that, with the qualification that the "interested party subjects himself, in all things respective to this "new colony, to the general law in the matter, dated 18th August, "1824. I communicate this to your Excellency, by supreme order,

their representation dated the 13th of last March, to which augmentation, this government has agreed—the supreme government having so ordered in its Resolution dated 22d April, 1828—which original appears in this document, with the understanding that it being agreed to stipulate and observe the conditions following:—

"*First.* The survey of the territory, which in addition to that which they have contracted for with this government, on the 11th June, 1828, being augmented by these presents, it shall begin on the bank of the Guadalupe River, where the former began; thence, following a parallel line with the coast, as the river Nueces, as a boundary known between the State and that of Tamaulipas; thence downwards, along the left bank of said river to where it disembogues into the sea; thence upwards along the coast to the disemboguing of the river Guadalupe, and thence upwards along the same river, to the point at which the survey began, which shall contain the ten littoral leagues precisely, and no more.

"2*d.* The territory thus defined the empresarios will receive as an addition to the former contract, celebrated on the 11th of June, and mentioned in the former condition, and as such, subject in the adjudication to the same requirements as agreed to in that contract, with which the aforesaid empresarios shall punctually comply.

"His Excellency, the Governor, and the attorney, in the names of the empresarios agreeing to the stipulations in this contract, obligate themselves reciprocally in its punctual fulfilment, before me, the Secretary of the Government, signing it in testimony thereof.

"And the original document being filed in the archives, it was ordered that a certified copy of it be given to the party interested for his security, and consequent effects.

JOSÉ MARIA VIESCA,
JOSÉ MARIANO GRANDE.

"SANTIAGO DEL VALLE,
Secretary.

"(*A Petition from Empresarios and Answer from the Governor.*)

"MOST EXCELLENT SIR: The citizen Santiago Power to your excellency respectfully states, that as empresario, in connection with the citizen Santiago Hewetson, for the settling of the department of Texas, I contracted with your Excellency in April, 1829, the approbation of the General Government being previously obtained, the littoral territory, which is comprehended from the creek de La Vaca, to the river Nueces, within the breadth of ten leagues, and there being within the demarcation of this territory, as said, a part of that pertaining to the Mission of Refugio: Your Excellency will therefore be pleased, that disputes may be obviated and that mistakes may be avoided, to give effect to the resolution assented to by your Excellency, in my former petition, declaring expressly, that in the ten littoral leagues referred to in the contract, to which I have made reference, none shall

be held for lands of the Mission, but those which the titles, in good faith, of its formation expressly define, without permitting pretensions to these lands, sustained in whatever manner, or documents of any other nature. As well, it may also please your Excellency to grant me to found thereon the four hundred families I have to introduce into the aforesaid department of Texas, the same place where formerly was the Mission; for by dispersion it has been abandoned and almost destroyed, binding myself to satisfy, according to the judgment of experienced men, and according to Article 35 of the law of colonization, the value of the few rights which may exist, and to indemnify, for those abandoned 'Sitios,' whomsoever may be the owners of them.

"The settlement of this place, of which I have mentioned, and which I pray of your Excellency that you be pleased to grant to me, is of well known usefulness, there not being elsewhere within the territory I am to colonize, an appropriate place for a settlement.

"Therefore I pray your Excellency to be pleased to decree in conformity to this petition, in which I shall receive favor and gratification.

"SANTIAGO POWER.

"LEONA VICARIO, *April* 21*st*, 1830.

"LEONA VICARIO, 21*st April*, 1830.

"The foregoing solicitude, containing two points, the determination of which is asked of this government, it decrees respecting the first, that in effect no lands are held to belong to the Mission of Refugio, except those which are expressly defined by the titles, in good faith, of its foundation, and without this requisite, or some other of equal origin, which any individual, or other community, or corporation, may permit to accredit a right of property therein, it shall pertain to the respective contracts of colonization, which up to the present time have been celebrated in conformity to the stipulations established therein, or to the vacant lands of the State. And as regards the second, apply to the chief of the department of Bexar for information relative to the public or common usefulness, which can result from the settlement of the indicated place. Give notice of the decree to the party interested, that he may use it as may be to his advantage.

"VIESCA.

"SANTIAGO DEL VALLE,
Secretary.

"TO THE ALCALDE AT GOLIAD: The decree No. 177, issued by the Honorable Congress of the State, authorizes the alienation of the lands pertaining to the extinguished Mission, and that the community interests which pertained to them be sold to the best bidder. And in consideration of the petitions laid before this government to that effect, by the citizens Santiago Power and Santiago Hewetson, and in consideration of the reports made relative to the same subject of

their representation dated the 13th of last March, to which augmentation, this government has agreed—the supreme government having so ordered in its Resolution dated 22d April, 1828—which original appears in this document, with the understanding that it being agreed to stipulate and observe the conditions following:—

"*First.* The survey of the territory, which in addition to that which they have contracted for with this government, on the 11th June, 1828, being augmented by these presents, it shall begin on the bank of the Guadalupe River, where the former began; thence, following a parallel line with the coast, as the river Nueces, as a boundary known between this State and that of Tamaulipas; thence downwards, along the left bank of said river to where it disembogues into the sea; thence upwards along the coast to the disemboguing of the river Guadalupe, and thence upwards along the same river, to the point at which the survey began, which shall contain the ten littoral leagues precisely, and no more.

"2*d.* The territory thus defined the empresarios will receive as an addition to the former contract, celebrated on the 11th of June, and mentioned in the former condition, and as such, subject in the adjudication to the same requirements as agreed to in that contract, with which the aforesaid empresarios shall punctually comply.

"His Excellency, the Governor, and the attorney, in the names of the empresarios agreeing to the stipulations in this contract, obligate themselves reciprocally in its punctual fulfilment, before me, the Secretary of the Government, signing it in testimony thereof.

"And the original document being filed in the archives, it was ordered that a certified copy of it be given to the party interested for his security, and consequent effects.

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be held for lands of the Mission, but those which the titles, in good faith, of its formation expressly define, without permitting pretensions to these lands, sustained in whatever manner, or documents of any other nature. As well, it may also please your Excellency to grant me to found thereon the four hundred families I have to introduce into the aforesaid department of Texas, the same place where formerly was the Mission; for by dispersion it has been abandoned and almost destroyed, binding myself to satisfy, according to the judgment of experienced men, and according to Article 35 of the law of colonization, the value of the few rights which may exist, and to indemnify, for those abandoned 'Sitios,' whomsoever may be the owners of them.

"The settlement of this place, of which I have mentioned, and which I pray of your Excellency that you be pleased to grant to me, is of well known usefulness, there not being elsewhere within the territory I am to colonize, an appropriate place for a settlement.

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"The foregoing solicitude, containing two points, the determination of which is asked of this government, it decrees respecting the first, that in effect no lands are held to belong to the Mission of Refugio, except those which are expressly defined by the titles, in good faith, of its foundation, and without this requisite, or some other of equal origin, which any individual, or other community, or corporation, may permit to accredit a right of property therein, it shall pertain to the respective contracts of colonization, which up to the present time have been celebrated in conformity to the stipulations established therein, or to the vacant lands of the State. And as regards the second, apply to the chief of the department of Bexar for information relative to the public or common usefulness, which can result from the settlement of the indicated place. Give notice of the decree to the party interested, that he may use it as may be to his advantage.

"VIESCA.

"SANTIAGO DEL VALLE,
Secretary.

"TO THE ALCALDE AT GOLIAD: The decree No. 177, issued by the Honorable Congress of the State, authorizes the alienation of the lands pertaining to the extinguished Mission, and that the community interests which pertained to them be sold to the best bidder. And in consideration of the petitions laid before this government to that effect, by the citizens Santiago Power and Santiago Hewetson, and in consideration of the reports made relative to the same subject of

the 6th June and 3d July of the last year, 1830, and other documents existing in the procedure relating to this matter, I have deemed proper to issue, for the better understanding of the aforesaid law, the following instructions:—

"*First.* To each family or single person, whose names appear in the adjoining list, and who belong to the mission of the Espiritu Santo, there shall be given, within the area which pertained to the said Mission, the land which corresponds to them in conformity with the provisions in articles 14 and 15 of the law of colonization of the State, which land shall be pointed out to them, intermixing them with the other settlers, causing them to understand, that they are obligated to cultivate it in accordance with the said law.

"*Fourth.* These same empresarios shall be bound to receive in their colony whatever Mexican families may present themselves in the character of settlers, providing they possess the necessary requisites, and consequently the citizens of the village of Goliad, and others, who have presented petitions for lands to this government situated there, shall present themselves to the aforesaid empresarios, and shall be received as such settlers, and be enumerated in the number of families for which they have contracted. God and Liberty.

"LEONA VICARIO, 29*th May*, 1831.

"LETONA.

"*Senor Political Chief of the Department of Bexar.*

"SANTIAGO DEL VALLE,
Secretary."

Bill of Exceptions continued.

The defendant used a certified copy of a correspondence between General Teran, Agent of the General Government of Mexico, and other officers of that government, and of the State Government of Coahuila and Texas, concerning the survey and observance of the Border and Littoral Leagues, which copy was from the General Land Office of Texas, as part of the history of the country.

And in like manner he used other colonial contracts.

Cordova's Map of Texas was also used for illustration by both parties.

It was admitted by attorney of plaintiffs, that the original title for the land in controversy had not been deposited in the General Land Office, nor recorded there.

The foregoing was all the evidence in the case.

The evidence being closed, the plaintiffs, by their attorney, requested the Court to instruct the jury as follows:—

1. That the Alcalde had authority to give said grant.

2. That the land was, when granted, within the municipality of Goliad, and not within that of the colony of Power & Hewetson, or the Coast Leagues.

3. That the objection taken by counsel to the plaintiff's grant, that it united lands by two different tenures, that by gift, and in sale, cannot be maintained, though it may be true, that as to one no forfeiture could be incurred, and as to the other that it might; for if the forfeiture were incurred, it could be enforced by proceedings on behalf of the State, and when declared, the land could be divided by partition, giving to the State that forfeited, and to the party that which was not forfeited.

4. The proper mode of ascertaining the boundary of the Coast Leagues, so as to comply with the prohibition contained in the fourth article of the General Colonization law, and the 7th article of the State law, is first to ascertain the bearing of the coast of the islands on the Gulf of Mexico, and then run a line parallel to a line on said bearing, ten leagues from it, into the interior; for the reason, that the articles of the two laws referred to, do, one in express terms, and the other by implication, extend the prohibition only to the ten Littoral Leagues on the coast of the Gulf of Mexico.

5. It was competent for the State Executive, in making regulations in regard to contracts of colonization, and as to the mode of making surveys, to leave the littoral leagues free, to direct the measurement of littoral leagues to be commenced on the main land, on the shores of the bays, and from thence to run on a border of ten leagues, parallel to said coast of the bays.

6. And the said State Executive, in making contracts for colonization, might make them with a view to such measurement, as is supposed in the last above instruction. Provided, as to so much of the land contracted as was within the said littoral leagues, measuring them from the island shores on the Gulf of Mexico, the consent of the National Executive to such contract was obtained; and as to the other, he having full power as to all land within the State, by the State law of 1825.

7. In ascertaining the interior line of contract, made as supposed in the two last instructions, the measurement had to be made by beginning on the firm land (the same as main land), on the shore of the bay, and then by running a line parallel to the said bay coast on a border of ten leagues.

8. In running the interior line, no one or more points, as for instance, the mouth of the Guadalupe at the one extremity, and the mouth of the Nueces at the other, where there are other points below or above a right line, from the mouth of one river to the other, can be assumed as points, from which, running by a line perpendicular to the coast on the Gulf shore, into the interior, to find the interior boundary of said contract, but the line into the interior has to be run with the meanders of the coast.

9. If by running into the interior, from the coast of the Gulf of Mexico, as indicated in instruction No. 4, or by commencing on the bay shore, as indicated in instructions numbers 5, 6, 7, and 8, it be ascertained that the land in contest is not within the actual prohi-

bited border of the coast of the Gulf of Mexico, or within what, by the Executive, is considered the littoral leagues, then as to the former, the prohibition has not been violated, and as to the latter, the land was within the jurisdiction of the Municipality of Goliad, and the Alcalde had a right to issue the grant, and it is not void.

10. If, however, it be ascertained that the land in contest was within the boundary of the Colony of Power & Hewetson, as that boundary has been run by White, or Richardson, or Bernard and Lea, but out of the actual boundary, measuring from the island shores on the Gulf of Mexico—though the grant then being within a colony, would not be legal, but illegal, being on appropriated land, yet the grant is not void, but voidable only, not being declared void by law—and might be ratified and confirmed, and has been so ratified by the law of 1835, Decree 314, read by plaintiff's counsel, and by the act of the Commissioner in the colony, endorsed on the grant.

11. If, however, said grant was not ratified, its validity cannot be inquired into in this action, as that is a question only to be made by the State, and not by third persons.

12. If Gertrudis Barrera was a citizen of the Republic of Mexico, domiciliated within the State of Coahuila and Texas, when the land in question was granted to her, her abandonment of the State of Coahuila and Texas, and settlement in Matamoras, in the State of Tamaulipas, after the commencement of the revolution in Texas, and before the declaration of Texas independence, was not a forfeiture of the land so granted, nor did the land thereby become vacant, and after close of the revolution in Texas, she would have been authorized to enforce her right, had she then been living.

13. If Madam Barrera died in Tamaulipas in 1842, then being a citizen of the said State of Tamaulipas, domiciliated there, and the female plaintiff was her only heir, she too being a citizen of, and domiciliated in Tamaulipas, said heir could and did take, by the law here, the land in contest, by descent, and had a right to enforce her title by descent, to the same extent that her ancestor could have done, but subject, as she is an alien, to forfeiture by proceedings on the part of the State.

14. But if no proceedings were instituted and perfected before the late treaty between the United States and Mexico, the right in said heir becomes perfect, and not subject to forfeiture, by virtue of the eighth article of said treaty.

The defendant, by his attorney, then requested the Court to instruct the jury as follows:—

1. The Testimonio to Gertrudis Barrera does not show that a legal title was vested in her for any part of the premises in controversy, because of the blending of a league in gift, and three leagues in sale; and the jury may consider the testimonio as withdrawn from their consideration, and, therefore, the verdict should be for the defendant.

2. The jury may consider the territory, called the littoral leagues, as extending ten Mexican leagues into the interior land, from the nearest part of the shore of the Gulf of Mexico, including its bays.

3. If the jury should believe, from the evidence, that the land is within the littoral leagues, the title of the plaintiffs would be void, because the concession was for land out of the littoral leagues.

4. If the jury should believe, from the evidence, that the land is within the littoral leagues, and that the price and payment were at a rate of one hundred dollars a sitio, for the three in sale, the grant would be inoperative for the land so situated, for want of authority to sell that land at that price, and for want of payment at the time of sale, of one-fourth of the legal price.

6. If the jury should believe, from the evidence, that the land is situated within the littoral leagues, the grant would be void at its date, without the previous approbation of the Executive of the General Government of Mexico, and of such approbation the burden of proof is on the plaintiffs, independent of any connection with the approval of the contract with Power and Hewetson, and independent of any presumption from the grant itself.

7. If the jury should believe, from the evidence, that Gertrudis Barrera and the plaintiffs are aliens to the Republic of Texas, and citizens of the Mexican nation, resident in its territory at the time of the death of said Gertrudis, and that she died in the year 1842, and that plaintiffs have continued to be citizens of the Mexican nation, resident therein, they may be considered as having no title, by descent from her, for the lands in controversy.

8. If the jury should believe, from the evidence, that Gertrudis Barrera had her domicil at Matamoras, on the west side of the Rio Grande, before the declaration of independence by Texas in 1836, and thereafter continued to be a Mexican citizen, resident at that place until her death, and that she died in 1842, any title she may have had under the grant may be considered as terminated during her lifetime, or at her death.

9. If the jury should believe that the land in question is not entirely out of the colony of Power & Hewetson the grant would be inoperative for the land within.

Instructions numbered 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, as requested by plaintiff's attorney, were given to the jury; and the instruction, numbered 4, so requested, was also given to the jury, but with a qualification that the water intervening between the islands and the mainland should not be estimated in the measurement.

Instructions numbered 1, 2, 3, 5, 6, 7, 8, as requested by defendant, were refused, and instructions numbered 4 and 9, so requested, were given, but with the qualification that the title was nevertheless confirmed by the decree numbered 314, of the laws of Coahuila and Texas.

To which opinions of the Court, in giving and refusing instruc-

tions, and in admitting evidence respectively, the defendant excepted at the time before the jury retired; and he now prays that the foregoing bill of exceptions may be allowed, signed, sealed, and made part of the record; which was done accordingly this 24th day of March, 1854, by the Court.

JOHN C. WATROUS. [SEAL.]

Afterwards, to wit: on the fourth day of November, in the year of our Lord one thousand eight hundred and fifty-four, John F. McKenney, the defendant, filed an appeal bond, in the words following, to wit:—

Appeal Bond.

SUPREME COURT UNITED STATES,

In Error.

Know all men by these presents that we, John F. McKenney, E. Luter, and Matthias Fulcrod are firmly held and bound unto Manuel Savarago and wife in the sum of two hundred and fifty dollars, to be paid to the said Manuel Savarago and wife, their executors or administrators.

To which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, and dated this 23d day of October, A. D. 1854.

Whereas, the above-named John F. McKenney hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered against him in a suit instituted by the said Manuel Savarago and wife against him in the United States District Court for the District of Texas, at the city of Galveston:

Now, therefore, the condition of this obligation is such that if the above bound John F. McKenney shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN F. McKENNEY, [SEAL.]
M. FULCROD, [SEAL.]
E. LUTER. [SEAL.]

Sealed and delivered in presence of

I agree that the above bond has been duly approved by the Judge of the District Court of the District of Texas.

R. A. HUGHES,
for SABRIEGO & WIFE.

November 1*st*, 1854.

Approved.

JAMES LOVE,
Cl'k U. S. Dist. Court, Dist. Texas.

DISTRICT COURT OF THE UNITED STATES,
District of Texas:

I, James Love, Clerk of the District Court of the United States for the District of Texas, certify that the foregoing sixty-six pages, exclusive of the index, contain a true and perfect copy of all the proceedings in the case of Manuel Saviego and Wife *vs.* John F. McKenney.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at the city of Galveston, this 25th day of November, in the year of our Lord one thousand eight hundred and fifty-four.

[SEAL.] JAMES LOVE,
Cl'k U. S. Dist. Court, Dist. Texas.

Clerk's fee $28 00.

Filed 11 Dec. 1854.